

Parker (Migration) [2021] AATA 2342 (21 June 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Sophie Victoria Parker
CASE NUMBER:	2102138
HOME AFFAIRS REFERENCE(S):	BCC2020/2329636
MEMBER:	Jason Pennell
DATE:	21 June 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Statement made on 21 June 2021 at 4.56pm

CATCHWORDS

MIGRATION – cancellation – Temporary Business Entry (Class UC) visa – Subclass 457 (Temporary Work (Skilled)) – member of the family unit – relationship ceased – applicant claims of family violence – employer willing to sponsor the applicant – financial and emotional hardship – decision under review set aside

LEGISLATION

*Migration Act 1958, ss 5, 48, 116, 140
Migration Regulations 1994, r 1.12*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 18 February 2021 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa under s.116 of the *Migration Act 1958 (the Act)*.
2. The delegate cancelled the visa under s.116(1)(a) of the Act on the basis that the applicant did not satisfy paragraph (2)(a) of r 1.12 of the *Migration Regulations 1994 (the Regulations)* as she was no longer in a genuine and continuing relationship with the primary visa holder. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 16 June 2021 to give evidence and present arguments. The Tribunal exercised its discretion to hold the hearing by video, determining it was reasonable to hold a hearing by video, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to its objective of providing a mechanism of review that is fair, just, economic, and quick. The Tribunal is satisfied the applicant was given a fair opportunity to give evidence and present arguments. As such, the hearing was held via conferencing facilities using the Microsoft Teams program.
4. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(a) of the Act. If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.
6. *Background and Migration History*
7. The applicant is a 26-year old female from the United Kingdom who was granted a TZ-417 Working Holiday Visa on 7 April 2017 and arrived in Australia on 16 May 2017.
8. She subsequently applied for a UC-457 Temporary Work visa as a secondary applicant which was granted on 22 November 2017. The visa was granted because, among other criteria, she was a member of the family unit of the primary visa holder, Daniel Michael Pettit.¹ The applicant visa was due to expire on 22 November 2021.
9. The applicant departed Australia once on 3 November 2018 and arrived back in Australia on 18 November 2018. She has since remained onshore.
10. By a Notification of Changed Circumstances dated 21 August 2020 filed by Mr Pettit, the Department was notified the applicant had ceased to be the spouse or a de-facto partner of the primary visa holder.
11. Regulation 1.12 of the Regulations states:
 12. '(2) A person is a member of the family unit of another person (the family head) if the person:
 13. (a) is a spouse or a de facto partner of the family head; or....'
14. To be a member of the family unit of Mr Pettit pursuant to r 1.12(2)(a) of the Regulations, the applicant needed to continue to be either a spouse or de facto partner

¹ Movement records, Tribunal file 2102138, Doc ID 8323568.

of Mr Pettit as defined under section 5F and 5CB of the Act. In particular pursuant to section 5CB of the Act, for a person to be a de facto partner of another they must have a mutual commitment to a shared life to the exclusion of all others and the relationship must be genuine and continuing.²

15. Accordingly, on 19 January 2021, the Department sent the applicant a Notice of Intention to Consider Cancellation (NOICC)³ by email advising that they consider the applicant to no longer be in genuine and continuing relationship with the primary visa holder based on the information before the Department. Thus, the applicant ceased to be a member of the primary visa holder's family unit as prescribed by r 1.12(2)(a) of the Regulations.
16. Consequentially, the applicant's 457 visa is liable for cancellation under s.116(1)(a) of the Act. The NOICC provided the applicant with an opportunity to respond within the prescribed period.
17. On 22 January 2021, the applicant requested for an extension of 14 days to respond to the NOICC which was granted on the same day.⁴ On 3 February 2021, the applicant provided the following material in response to the NOICC:⁵
 - (a) Representative's legal submissions dated 01 February 2021
 - (b) Applicant's personal statement
 - (c) Copy of applicant's United Kingdom passport
 - (d) Letter of support from applicant's employer dated 19 January 2021
 - (e) Residential tenancy agreement made on 5 September 2020
 - (f) Dental surgery invoice dated 19 September 2019
 - (g) Credit card bank statement for the period 5 December 2020 to 6 January 2021
18. The applicant submitted to the Department and the Tribunal that her visa should not be cancelled by reason that:
 - (a) her relationship with Mr Pettit had been physically, emotionally abusive. The applicant provided a Psychology Report by her psychologist, Dimitri Hawa, dated 8 June 2021 ('the Psychology Report').⁶ The report details circumstances in which the applicant claims she has been physically and emotionally abused. The Report concluded that the applicant now suffers from Post-traumatic Stress Disorder ('PTSD') and Major Depressive Disorder ('MDD').
 - (b) the applicant is employed by Husqvarna as a production supervisor for a period of three years. A letter dated 19 January 2021⁷ from Husqvarna confirmed that the applicant is employed by the company as claimed. The letter describes the applicant as having been instrumental in the design and development of the company's procedure to improve the quality of the manufacturing process. The company stated that she is a valuable member of the organisation and that they would not be able to find a replacement if her visa was cancelled.
 - (c) the applicant has been compliant with all the conditions of her visa and has been a law-abiding person within the community. The cancellation comes about as a result of no fault of her own.

²Section 5CB(2)(a) & (b) of the Act.

³NOICC dated 19 Jan 2021, Department eFile BCC20202329636, Doc ID 8151970

⁴Correspondence regarding NOICC, Department eFile BCC20202329636, Doc ID 8151973; 8151974

⁵Response to NOICC, Department eFile BCC20202329636, Doc ID 8151976

⁶AAT file No 2102138 Doc ID 8515875

⁷Letter from Husqvarna dated 19 January 2021; Bcc20202329636, CLD2021/3591606 Doc ID 8151976

- (d) the applicant would suffer financial and emotional hardship if she was required to return to the United Kingdom. She claims that in the current circumstances she would find it difficult to find a job.
 - (e) if her visa is cancelled, she would be forced to depart Australia during the Covid-19 pandemic making it difficult for her to return to the United Kingdom safely. The applicant claims to have an immune condition that can compromise her health if she was to contract Covid-19.
 - (f) the applicant has a grandfather living in Australia for the past 60 years, with whom she has developed a close relationship since being in Australia.
19. On 18 February 2021, the delegate cancelled the applicant's 457 visa under s.116(1)(a) of the Act on the basis that the applicant did not satisfy paragraph (2)(a) of regulation 1.12 of the Regulations.
 20. On 24 February 2021, the applicant lodged a review application in respect of the decision to cancel her 457-visa resulting in this AAT case number 2102138.
 21. *Submissions to the Tribunal*
 22. The applicant submitted the following material in support of their merits review application:
 - (a) Copy of delegate's notification and decision record⁸
 - (b) Copy of representative's legal submissions dated 01 February 2021⁹
 - (c) Copy of letter of support from applicant's employer dated 19 January 2021¹⁰
 - (d) Psychological report from applicant's psychiatrist dated 8 June 2021¹¹

Does the ground for cancellation exist?

s.116(1)(a) - Fact or Circumstance for visa grant no longer exists

23. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists. In this case, the applicant conceded that she was no longer in a relationship with Mr Pettit. As such, she conceded that she was no longer a member of Mr Pettit's family unit having ceased to be the spouse or a de-facto partner of the primary visa holder.
24. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

25. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
26. *The purpose of the visa holder's travel and stay in Australia.*
27. The applicant was granted a Temporary Work visa for the purposes of being able to accompany and remain in Australia with the primary visa holder, Mr Pettit with whom she was in a married or de facto relationship.

⁸Notification and Decision Record, Tribunal 2102138, Doc ID 8141620; 8141621

⁹Response to NOICC, Tribunal 2102138, Doc ID 8141622

¹⁰ Letter of Support, Tribunal 2102138, Doc ID 8141623

¹¹Psychological report, Tribunal 2102138, Doc ID 8515875

28. The applicant ceased to be in a relationship with Mr Pettit in or about August 2020 and as such the purpose of the visa has now ended. The Tribunal places some weight on this consideration against the applicant.
29. The applicant has been employed by Husqvarna. The Department records indicate that the applicant lodged an application for a Temporary Activity visa on 2 February 2021 where the proposer was Husqvarna Australia Pty Ltd. The applicant was forced to withdraw the application due to the cancellation of her current visa by the Department. The applicant's evidence was Husqvarna remain willing to sponsor her visa application and will do so if her visa is not cancelled. The Tribunal places some weight in the applicant's favour because Husqvarna is prepared to support the applicant's application for a working visa.
30. *The extent of compliance with visa conditions*
31. There is no evidence that the applicant has breached any of her visa conditions. The Tribunal gives this consideration some weight in the applicant's favour.
32. *Degree of hardship that may be caused*
33. The applicant submits that if her visa is cancelled it will cause her significant financial and emotional hardship.
34. The applicant's evidence was that she is qualified as a Beauty Therapist. Prior to coming to Australia, the applicant worked as a Beauty Therapist and as a soft furnishing's retailer. In Australia, the applicant has developed a career with Husqvarna having developed skills as a Production Supervisor Assembly in the manufacturer of hoses. She claims that if her visa is cancelled her career in the manufacturing sector would be interrupted causing her considerable financial hardship. She claims that it would be extremely difficult for her to find similar type of employment in the United Kingdom forcing her to re-commence another career in another sector of the economy.
35. The Tribunal accepts that the applicant will face financial hardship if her visa is cancelled and she is forced to return to the United Kingdom. However, the Tribunal notes that she holds a qualification as a Beauty therapist and has the necessary aptitude and ability to seek and find employment. As such, the Tribunal places little weight on this consideration in the applicant's favour.
36. In addition, she claims that due to Covid-19 she would have trouble travelling to the United Kingdom due to travel restrictions being in place. However, the Tribunal notes that several contingency options are available for individual returning to the United Kingdom. Information in relation to these options can be found on the Department's website at www.covid19.homeaffairs.gov.au.
37. Nevertheless, the applicant has developed a career at Husqvarna. Her visa was due to expire on 22 November 2021 (5 months) and as a result she was in the position of having to apply for a further visa in any event. Her evidence was that Husqvarna is prepared to sponsor her application for a work visa but has not been able to do so because of the cancellation of her current visa. In these circumstances, the hardship the applicant will suffer will be the fact that she would be denied the opportunity of making a valid application for a visa to allow her to continue to remain in Australia lawfully and work for the company. In addition, the company will suffer hardship by being denied the opportunity of keeping a valued employee with whom it has invested considerable resources in training and developing for the purposes of supervising its production line. The company in its letter dated 19 January 2021¹² referred specifically to the fact that the applicant was a valued employee of the company and that it would

¹² Letter from Husqvarna dated 19 January 2021; Bcc20202329636, CLD2021/3591606 Doc ID 8151976

not be able to replace her in the event that her visa is cancelled and she is forced to return to the United Kingdom. The Tribunal places considerable weight on this factor in the applicant's favour.

38. *Circumstances in which ground of cancellation arose.*

39. The ground for the cancellation arose because the applicant has ceased to be either a spouse or de-facto partner of the primary holder of the visa, Mr Pettit.

40. The Psychology Report provided by the applicant indicates that the relationship between the applicant and Mr Pettit broke down because of the issue of family violence. The report provided details of the family violence in which the applicant claims that she was physically, emotionally, and sexually abused while in the relationship with Mr Pettit. The Psychology Report states that because of the abuse she suffered, the applicant is being treated for PTSD and MDD.

41. The guidelines provide that generally, a visa should not be cancelled where the circumstances in which the ground for cancellation arose were beyond the visa holder's control. In this case, based on the Psychology Report provided by the applicant the Tribunal is satisfied that the circumstances of the visa cancellation and the resulting ground for cancellation were beyond the visa holder's control. The Tribunal places significant weight on this factor in the applicant's favour.

42. *Past and present behaviour of the visa holder towards the Department*

43. There is no evidence to suggest that the applicant behaviour toward the Department or the Tribunal has been uncooperative. The Tribunal places little weight on this consideration in the applicant's favour.

44. *Any consequential cancellations under s.140*

45. The circumstances of this case are such that no person's visa would or may be consequentially cancelled under section 140 of the Act.

46. The Tribunal gives no weight to the consideration.

47. *Any mandatory legal consequences*

48. The applicant would become an unlawful non-citizen and may be liable for detention under section 189 and removal under section 198 of the Act if the visa holder does not resolve her immigration status or voluntarily depart.

49. The Tribunal has considered the effect of section 48 of the Act. If section 48 applies, the applicant would have limited options of applying for a further visa in Australia if the applicant's visa is cancelled. As referred to above, if her visa is cancelled, she would be prevented from making a further application for a sponsored work visa. The Tribunal place some weight on this consideration in the applicant's favour.

50. *Any international obligations*

51. There is no evidence before the Tribunal which indicates that cancellation of the visa in this case would result in any breach of Australia's international obligations. As such the Tribunal gives this consideration no weight.

52. *Any strong family, business or other ties in Australia*

53. The applicant submits that she has strong ties to her employer, Husqvarna. She is a valued employee and the company has invested considerable time and resources in developing her skills as a Production Supervisor Assembly within the company. As a result, the Tribunal accepts that the applicant has developed strong ties to her employer.

54. In addition, the applicant has a grandfather who has lived in Australia for the past 60 years. Her evidence was that because of her being in Australia, she has developed a strong and close relationship with her grandfather.
55. The Tribunal places some weight on this consideration in favour of the applicant.
56. *Other relevant matters*
57. There are no other factors relevant matter for consideration.
58. Therefore, having considered all the circumstances as a whole, the Tribunal concludes that the visa should not be cancelled.

DECISION

59. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Jason Pennell
Senior Member